The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
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DEPUTY CLERK

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N O T I C E

IN THE MATTER OF K. DOUGLAS THORNTON, PETITIONER

On September 25, 2000, Petitioner was definitely suspended from the practice of law for a period of six months and one day, retroactive to February 15, 2000. In the Matter of Thornton, 342, S.C. 440, 538 S.E.2d 4 (2000). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 17, 2001.

Columbia, South Carolina

February 16, 2001

The Supreme Court of South Carolina

IN THE MATTER OF DAVID H. CONNOLLY, JR., RESPONDENT

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 5, 1987, David H. Connolly, Jr. was admitted and enrolled as a member of the Bar of this State.

In a letter addressed to the Clerk of the Supreme Court of South Carolina, dated January 9, 2001, David H. Connolly, Jr. submitted his resignation from the South Carolina Bar. His letter is made a part of this order.

IT IS THEREFORE ORDERED THAT David H. Connolly, Jr. shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

David H. Connolly, Jr. shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of David H. Connolly, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 9, 2001

DAVID HUGH CONNOLLY, JR.
4421 Phil Street
Bellaire, Texas 77401
(713) 667-9763

January 9, 2001

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: David H. Connolly, Jr./ Membership resignation
State Bar Number: 009711 (Inactive)

Dear Mr. Shearouse:

By this letter I wish to resign as a member of the South Carolina Bar. I would appreciate your submitting it to the Court for their consideration in this regard. I am currently an inactive member and have not practiced in South Carolina for over five years. Additionally, as I am presently pursuing a Ph.D. in History at Rice University I do not intend to resume the practice of law in South Carolina. I understand that by resigning my membership I will be required to retake the bar and undergo all the procedures demanded of a first time applicant should I ever decide to resume practicing in the state.

If additional information, or action on my part, is required, please do not hesitate to call.

Sincerely,

s/ David H. Connolly, Jr.

Cc: South Carolina State Bar

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 20, 2001

ADVANCE SHEET NO. 7

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Leon C. Banks, Respondent.

Opinion No. 25252
Submitted January 16, 2000 - Filed February 12, 2001

DISBARRED

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment.[1] We accept the

[1]Respondent was placed on incapacity inactive status by order of this Court dated August 13, 1999. In re Banks, 336 S.C. 334, 520 S.E.2d 316

agreement and disbar respondent. The facts as admitted in the agreement are as follows.

Facts

During the course of representing several defendants throughout 1997 and once in 1998, respondent received funds totaling over $161,000 from the Office of Indigent Defense (OID). During that same time, respondent received over $4,000 from the Lancaster County Public Defender Corporation and $10,000 from the Kershaw County Public Defender Corporation. Respondent deposited these funds into his firm's capital litigation account. Respondent did not comply with Rule 417, SCACR, in that he failed to retain sufficiently detailed documentation to adequately identify these deposits.

Respondent disbursed the money from the capital litigation account but did not note on the checks any information as to purpose, client, or file number as required by Rule 417, SCACR. These checks were made payable to respondent personally, to his firm's general operating account, and to cash. Respondent converted the majority of the OID funds for purposes other than that for which they were intended. Both the capital litigation account and the general operating account frequently had negative balances.

After respondent learned about the shortage of funds in the capital litigation account, he deposited $31,260 into the account in February of 1998. That deposit consisted of one check drawn on respondent's personal account that he held jointly with his wife. At the time respondent negotiated the check from his personal account, that joint account contained only $1,470.10. This intentional misrepresentation constituted check kiting.

Also in February of 1998, a deposit of $24,500 was made into the capital litigation account. These funds were from a personal loan from a

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(1999).

third party. The loan was predicated on a promissary note with a ninety day repayment period. Respondent used these funds to make various payments to service providers and expert witnesses relevant to a capital client. Respondent failed to repay the lender within the ninety day period and the guarantor repaid the loan. As of August 13, 1999, respondent had not yet repaid the guarantor.

A financial management firm loaned money to respondent for personal living expenses. These loans were secured by account vouchers for work completed by respondent for the OID. The financial management firm made a complaint against respondent. Respondent had another attorney representing him in connection with this complaint. In November of 1998, respondent sent his attorney a note enclosing copies of OID vouchers submitted on five cases. Respondent never submitted those five vouchers to the OID nor did that agency make payments to respondent pursuant to those five vouchers.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, and complete records of such account funds shall be kept by the lawyer); Rule 8.4 (it is professional misconduct for a lawyer to: violate the Rules of Professional Conduct; commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engage in conduct involving moral turpitude; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in

conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tommy E. Brown, Sr., Petitioner,

v.

Allstate Insurance Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Special Circuit Court Judge

Opinion No. 25253
Heard November 15, 2000 - Filed February 20, 2001

REVERSED

James C. Cothran, Jr. and Robert M. Holland, both of Spartanburg, for petitioner.

Richard L. Patton, of Patton & Associates, of

Greenville, for respondent.

CHIEF JUSTICE TOAL: We granted Tommy E. Brown's ("Brown") petition for a writ of certiorari to review the Court of Appeals' decision in *Brown v. Allstate Ins. Co.*, 337 S.C. 499, 523 S.E.2d 807 (Ct. App. 1999). We reverse.

FACTS/PROCEDURAL BACKGROUND

On February 13, 1995, Brown's car stopped on U.S. Highway 29 between Cowpens and Gaffney in Cherokee County, South Carolina. He parked the car on the side of the road and left it overnight. The following morning, at approximately 2:00 a.m., Brown's 1984 Chevrolet Corvette was found burning. The car was a total loss as a result of the fire and was taken to the salvage yard. All parties agree the car was intentionally burned.

Prior to the fire, Brown's car was in pristine condition. Mr. Hamrick, the owner of Hamrick's Used Cars and Trucks, was familiar with the car and testified his son detailed the car one month prior to the fire. According to Mr. Hamrick, the car was in mint condition and it had many expensive additions, such as an excellent stereo system and "ground effects." Mr. Mathis, a mechanic who worked on the car for eleven years, testified Brown kept the car in near perfect condition. Mr. Mathis saw the car on the day of the incident and testified the engine was in good condition.

Brown filed a claim with Allstate Insurance Company ("Allstate"), his insurer, for the value of the car. Allstate denied the claim contending the car burned as a result of arson by, or at the direction of, Brown. According to Allstate, Brown was guilty of misrepresentation and bad faith by asserting a false claim. Allstate averred Brown had both the motive and opportunity to set the fire, and Brown misrepresented or concealed his involvement.

On October 12, 1995, Brown brought a civil action against Allstate for breach of contract and bad faith refusal to pay benefits. During the bench trial, Melinda Brown, Browns' ex-wife, testified Brown knew the engine was having problems prior to the fire, but he did not have enough money to fix it. The trial court did not find Melinda Brown's testimony credible because she smiled at inappropriate times during her testimony, did not recall the parties exchanged

criminal warrants prior to her contacting the insurance company, and she appeared to "gain some strange pleasure from her testimony against [Brown]." The trial court disregarded her testimony as unreliable and biased.

On February 10, 1998, the trial court found in favor of Brown for breach of contract and required Allstate to pay $25,000 for his automobile. The trial court dismissed the cause of action for bad faith refusal to pay benefits because several factors justified Allstate's initial refusal to pay benefits, including: (1) there were traces of gasoline in the carpet padding; (2) the stereo and alloy wheels had not been stolen; (3) there were inconsistencies in Brown's testimony; and (4) a statement by Brown's ex-wife that attempted to establish a motive for the fire.

The trial court found, and Brown and Allstate agreed, the fire was of an incendiary nature and intentionally set. The trial court further held Brown had opportunity to set the fire, but Allstate failed to establish a sufficient motive for burning the automobile. The trial court found it persuasive that the morning after Brown parked his car on the side of the road, he went to his usual repair shop to make arrangements to have the car towed, and apparently did not realize it had burned. Further, the trial court found the trial testimony indicated Brown "babied" his car and would have done nothing to harm it.

During the trial, over Allstate's objection, the trial judge allowed Brown to testify he had not been criminally charged with arson, aiding or abetting arson, or conspiracy to commit arson. Allstate appealed alleging the trial court erred in admitting evidence concerning the State's decision not to prosecute Brown for arson. The Court of Appeals reversed holding: (1) as a matter of first impression, evidence of the State's failure to prosecute the insured for arson was inadmissible; (2) this error required reversal; and (3) the presumption of regularity of proceedings in a bench trial did not apply.

The following issue is before this Court on certiorari:

> Did the trial judge err in receiving evidence the State did not charge or prosecute Brown for arson?

LAW/ANALYSIS

Brown and Allstate concede the trial judge received incompetent evidence

when he allowed Brown to testify he had not been prosecuted for arson or related crimes. We agree with the Court of Appeals' opinion and recent case law that evidence of non-prosecution for criminal arson is irrelevant and immaterial in a civil case for fire insurance proceeds. *See Rabon v. Great Southwest Fire Ins. Co.*, 818 F.2d 306 (4th Cir. 1987) (holding a federal trial court committed reversible error when it permitted a plaintiff in a suit for fire insurance proceeds to present evidence of his non-prosecution or acquittal on related criminal arson charges); *see also Kelly's Auto Parts, No. 1, Inc. v. Boughton*, 809 F.2d 1247 (6th Cir. 1987); *Am. Home Assurance Co., v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985); *Kamenov v. N. Assurance Co. of Am.*, 687 N.Y.S.2d 838 (N.Y. App. Div. 1999); *Cook v. Auto Club Ins. Ass'n*, 552 N.W.2d 661 (Mich. Ct. App. 1996); *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204 (Minn. Ct. App. 1993); 19 Couch On Insurance 2d *Evidence* § 79:571 (Rev. ed. 1983 & Supp. 1999) (indictment of insured for arson, or failure to indict him or her for such crime, is irrelevant and inadmissible in action on a fire insurance policy where the defense is the insured caused the fire).

According to the court in *Rabon*, evidence of criminal charges related to arson is excluded in suits for fire insurance proceeds because such evidence goes to the principal issue before the court and is highly prejudicial. *Rabon*, 818 F.2d at 309. Furthermore, a prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than those that apply in a civil proceeding. *Id.* "In particular, a prosecutor's decision to *nolle prosse* may take into account many factors irrelevant in a civil suit, such as the higher standard of proof required for a criminal conviction. In any event, a prosecutor's opinion whether the insured started the fire is inadmissible since based on knowledge outside his personal experience." *Id.*

Although we find the evidence of Brown's non-prosecution for arson was irrelevant and inadmissible, we reverse the Court of Appeals' decision because the admission of the evidence was harmless. We find there was not a sufficient showing the trial judge either affirmatively relied on the incompetent evidence, or could not have reached the same result without relying on the incompetent evidence.

We agree with the Court of Appeals' dissent, which concurred in the majority's finding that the evidence of Brown's non-prosecution was inadmissible, but dissented on the issue of prejudice. The dissent concluded, as do we, that the admission of the evidence was harmless because Allstate failed

to prove motive, an essential element of its defense. To prove arson, an insurer must demonstrate by the preponderance of the evidence the fire was of an incendiary origin, and the insured caused the fire. *Carter v. Am. Mut. Fire Ins. Co.*, 297 S.C. 218, 375 S.E.2d 356 (Ct. App. 1988). An insurer can prevail in an arson defense based solely on circumstantial evidence if it shows the fire was of an incendiary origin and the plaintiff had both the opportunity and the motive to set the fire. *Id.* (quoting *Fortson v. Cotton States Mut. Ins. Co.*, 308 S.E.2d 382, 385 (Ga. Ct. App. 1983)).

In this case, the trial judge held the fire was of an incendiary nature and Brown had the opportunity to set it. However, the trial judge ruled Allstate failed to prove Brown had sufficient motive for burning the vehicle. According to the trial judge, no evidence was introduced concerning Brown's stressed financial condition, other than his ex-wife's testimony, which the court discounted as unreliable. Furthermore, the trial court was persuaded by the fact an engine repair would cost less than the value of the car. Such repair would place the car in pristine condition and Brown would be able to sell the car for a substantial amount of money. Moreover, all the trial testimony indicated Brown "babied" his car and would have done nothing to damage it. The trial judge was also persuaded by the fact Brown visited his mechanic and asked to have the vehicle towed the morning after the fire, apparently unaware the vehicle was destroyed.

Based on these specific factual findings, the trial judge held Allstate did not establish motive. Because Allstate failed to prove an essential element of its defense, Allstate cannot demonstrate it was prejudiced by the trial judge's admission of the incompetent evidence. Therefore, the admission of the improper evidence was, at most, harmless error.

The Court of Appeals, in its majority opinion, held the admission of evidence was reversible error because the incompetent evidence was admitted precisely for consideration of the ultimate issue before the court – whether Brown committed arson of his vehicle. According to the majority: "We reject the application of the [presumption of regularity] rule where the court in a bench trial allows a potpourri of improper evidence *on the ultimate issue in the case* followed by an order with no ruling or comment by the court indicating a rejection of the incompetent evidence." *Brown*, 337 S.C. at –, 523 S.E.2d at 815 (emphasis in original). The majority held that because the trial judge never acknowledged the evidence was inadmissible, did not respond affirmatively to

counsel's argument in that regard, and did not reconsider the ruling or state the evidence would not be considered on the ultimate issue of arson, the overwhelming inference from the record was the trial judge considered the evidence. Accordingly, the majority concluded the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

The majority essentially adopts a new rule for trial judges sitting without a jury. According to the majority, if incompetent evidence is admitted on the ultimate issue of the trial, the trial judge must affirmatively reject this evidence, even if it is clear he is making a judgment based on competent evidence in the record. We reject this rule because it would require trial judges to rule on all admitted evidence in a bench trial. A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting. The majority's rule is, therefore, unnecessarily burdensome and would inhibit the trial judge's ability to evaluate the evidence and ascertain the truth.

CONCLUSION

Based on the lack of competent evidence of motive and the lack of reference to the incompetent evidence in the trial judge's order, there is not a reasonable probability such evidence had an effect on the result. We, therefore, **REVERSE** the Court of Appeals' decision and **REINSTATE** the decision of the trial court.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of John L. Creson, Petitioner.

ORDER

On September 9, 1999, this Court imposed concurrent six month and one year suspensions on petitioner, retroactive to March 8, 1999. In the Matter of Creson, 336 S.C. 565, 521 S.E.2d 274 (1999). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends that the petition be granted. We agree and hereby reinstate petitioner to the practice of law in this state.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
February 12, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas J. and Carolyn Silvester,

Appellants,

v.

Spring Valley Country Club,

Respondent.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3297
Heard October 12, 2000 - Filed February 12, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas J. and Carolyn B. Silvester, both of Columbia, pro se.

John E. Cuttino, of Turner, Padget, Graham & Laney, of Columbia, for respondent.

STILWELL, J.: Thomas and Carolyn Silvester filed this action against Spring Valley Country Club for damages and injunctive relief for trespass and nuisance. The trial court granted the Club's motion to dismiss the action, finding all claims barred by the statute of limitations. The Silvesters appeal. We affirm in part, reverse in part, and remand.

FACTS

In 1983, the Silvesters purchased a residence in Spring Valley subdivision. The rear of their lot adjoins a portion of the Club's golf course. Water from the Club's land channels onto the Silvesters' lot, allegedly causing erosion, the deposit of trash, and a potentially hazardous condition due to standing water. The Silvesters maintain this water channels through a man-made ditch, while the Club argues the water channels through a naturally occurring stream. The problem manifested itself shortly after the Silvesters occupied the house in 1984.

The Silvesters brought this action in April 1996. They alleged for a first cause of action a trespass occurring in 1992 when the Club constructed a french drainage system to collect and concentrate surface water, thereby exacerbating the Silvesters' drainage problem. They complain the Club failed to implement a proper storm drainage system to prevent water from taking over their property. The Silvesters argue that even if the Club has an easement to discharge storm water over their land, it has exceeded its rights. For their second cause of action, the Silvesters allege the Club's actions constitute a continuing nuisance affecting the enjoyment of their land.

On June 12, 1998, the Club filed a motion to dismiss the action "pursuant to Rules 41 and/or 56 of the South Carolina Rules of Civil Procedure." In its supporting memorandum, the Club argued the statute of limitations had expired.

The action was called to trial on June 17, 1998, with the Silvesters proceeding pro se. Prior to selecting a jury, the court heard the Club's motion to dismiss. During argument on the motion, Mr. Silvester admitted they realized the severity of the water problem by 1991. Mr. Silvester informed the court they

received a copy of an engineering study commissioned by the Club in October or November 1991, but the Silvesters insisted the Club did not follow its own study's recommendations.

Mrs. Silvester argued the action should not be dismissed based on the statute of limitations because it was an ongoing nuisance. She stated if the court dismissed the action, the Silvesters would have to file a new action for the continuing nuisance. The trial judge stated, "You might have to do that." During the colloquy, the trial judge made some remarks which the Silvesters interpreted as being antagonistic toward them as pro se litigants.[1]

The trial court granted the motion to dismiss based on the statute of limitations. The Silvesters appeal.

STANDARD OF REVIEW

The Club filed the motion to dismiss pursuant to Rules 41(b) and 56, SCRCP. Rule 41(b) permits the defendant, "[a]fter the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence," to move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Rule 41(b), SCRCP (emphasis added); see Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (holding Rule 41(b), SCRCP, allows the judge as the trier of facts to weigh the

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[1] During the colloquy the trial judge said:

> Mrs. Silvester, let me say something. . . . If you don't want to hire a lawyer, that's fine. But let me tell you what Abraham Lincoln said one time. A man who represents himself has a fool for a lawyer. That was in my Daddy's law office when I was a kid. It's great advice. But if you don't want to hire a lawyer, that's fine. That's your business. If you pay your seventy bucks you can come over here and play this game just like everybody else.

evidence, determine the facts, and render a judgment against the plaintiff at the close of his case if justified).

Rule 56, SCRCP, allows a party to move, with or without supporting affidavits, for summary judgment in his favor. Under the circumstances present here, we conclude the trial court effectively ruled on the motion as if it were a motion for summary judgment under Rule 56. Accordingly, we utilize the standard of review governing motions for summary judgment. See McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994) (holding a motion for summary judgment can be used to raise the defense of statute of limitations).

In determining whether summary judgment is proper, this court must view all evidence in the light most favorable to the non-moving party. Barr v. City of Rock Hill, 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998). Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id. Thus, we review the record in the light most favorable to the Silvesters.

LAW/ANALYSIS

I.
Trespass

The Silvesters pled trespass as the first cause of action in their complaint. However, at the hearing before the trial court, the continuing nuisance claim was the only issue clearly addressed. Additionally, the Silvesters' appellate brief does not raise as an issue on appeal error on the part of the trial court in granting summary judgment as to the trespass cause of action. Finally, at oral argument the Silvesters only argued the trial court erred in granting summary judgment to the Club on their continuing nuisance claim. We therefore find the grant of

summary judgment to the Club on the trespass cause of action is not presented to this court as an issue appropriate for appellate review. See Rule 208(b)(1)(B), SCACR (stating "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"); see Larimore v. Carolina Power & Light, 340 S.C. 438, 443-44, 531 S.E.2d 535, 538 (Ct. App. 2000) (noting an issue not raised to and ruled upon by the trial court is not preserved for appellate review).

II.
Nuisance

The Silvesters contend the trial court erred in granting the Club summary judgment on their continuing nuisance cause of action. We agree.

South Carolina follows the common enemy rule which allows a landowner to treat surface water as a common enemy and dispose of it as he sees fit. Glenn v. Sch. Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). However, an exception to this rule prohibits a landowner from using his land in such a manner as to create a nuisance. Id.; see Irwin v. Michelin Tire Corp., 288 S.C. 221, 224, 341 S.E.2d 783, 784 (1986).

The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land. See Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993). The distinction between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. Id.

A nuisance may be classified as permanent or continuing in nature. A continuing nuisance is defined as a nuisance that is intermittent or periodical and is described as one which occurs so often that it is said to be continuing although it is not necessarily constant or unceasing. 58 Am. Jur. 2d Nuisances § 28 (1989). A permanent nuisance may be expected to continue but is presumed to continue permanently, with no possibility of abatement. Id. § 27.

As to a permanent nuisance, such as a building or a railroad encroaching on a party's land, the injury is fixed and goes to the whole value of the land. Id.

When the statute of limitations begins to run hinges on whether a nuisance is classified as permanent or continuing. Id. § 26; see Glenn, 294 S.C. at 535-36, 366 S.E.2d at 50-51. When the nuisance is permanent in nature and only one cause of action may be brought for damages, the applicable statute of limitations bars the action if not brought within the statutory period after the first actionable injury. 58 Am. Jur. 2d Nuisances § 307 (1989). When the nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the original intrusion on the property and cannot be a complete bar. Id. Rather, a new statute of limitations begins to run after each separate invasion of the property. Id.; see Cutchin v. South Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (citing Webb v. Greenwood County, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956) (stating if the injury is permanent, the plaintiff has a single cause of action which cannot be split; however if the cause of the injury is abatable, each injury gives rise to a new cause of action)). A nuisance is continuing if abatement is reasonably and practicably possible. 58 Am. Jur. 2d Nuisances § 29 (1989).

In discussing the limitations period applicable in a continuing nuisance action, our supreme court has stated:

> Since every continuance of a nuisance is a new nuisance, authorizing a fresh action, an action may be brought, for the recovery of all damages, resulting from the continuance of a nuisance, within the statutory period of the statute of limitations, for which no previous recovery has been had, even though the original cause of action is barred, unless the nuisance has been so long continued, as to raise the presumption of a grant, or in case of injury to real property, unless the plaintiff's right of entry is barred. But when the injury is of such a nature, that all the damages resulting therefrom, whether past or prospective, are recoverable

> in one action, the statute of limitations begins to run, from the time of the completed erection of the nuisance. This rule, however, is subject to the modification, that when the cause of action is the consequential injury, from an act of erection which is not, in itself, an actionable nuisance, the statute does not begin to run, until the injury is actually inflicted.

Sutton v. Catawba Power Co., 104 S.C. 405, 408, 89 S.E. 353, 353 (1916).

In McCurley v. South Carolina Highway Dep't, the court stated that if the injury to neighboring lands is caused by negligence, or if the cause is abatable, then there arises a continuing cause of action. 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971). While the statute of limitations begins to run at the occurrence of the first actual damage, the landowner may at any time recover for injury which occurred within the statutory period. Id. Furthermore, although the statute of limitations may bar a nuisance action for damages, it "is not a defense in an action based upon nuisance for injunctive relief since such statutes do not bar the equitable relief of injunction." 58 Am. Jur. 2d Nuisances § 381 (1989); see Mack v. Edens, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) (stating injunctive relief is appropriate for continuous injury to land).

The Silvesters argue water channels from a man-made ditch dug by the Club onto their property. The Club maintains water channeling through a naturally occurring stream passes over a portion of the Silvesters' lot and only "occasionally" overflows their yard. However, Mr. Silvester testified at the hearing "there was an enormous amount of water coming through the property," and Mrs. Silvester stated "our property daily is being damaged." After reviewing the record, we find there exist genuine issues of material fact making summary judgment inappropriate in this case.

The Silvesters alleged a continuing nuisance and requested damages and injunctive relief. The trial court summarily applied the three year statute of limitations to the continuing nuisance cause of action without considering the possibility of abatement, the Club's alleged negligence, or the Silvesters'

request for injunctive relief. Viewing the evidence in the light most favorable to the Silvesters, we agree the trial court erred in applying the statute of limitations to their continuing nuisance claim and accordingly reverse the grant of summary judgment on this issue.

III.
Bias

The Silvesters lastly argue the trial court erred in granting the Club relief due to his personal bias against pro se litigants. This argument is without merit. "Adverse rulings, even if erroneous, are insufficient to establish a trial judge's bias or prejudice." Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987). In support of their argument, the Silvesters rely on the trial judge's comments at the conclusion of the hearing regarding his advice they obtain an attorney. The trial judge merely related the old adage that "the man who is his own lawyer has a fool for a client." State v. Owens, 124 S.C. 220, 223, 117 S.E. 536, 537 (1922). We find no evidence in the record the trial judge's ruling was based on or influenced by any bias against either the Silvesters or pro se litigants as a class.

Based on the foregoing, the order on appeal is affirmed as to the dismissal of the trespass cause of action and reversed and remanded as to the nuisance cause of action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Perry W. Lockridge,

Appellant,

v.

Santens of America, Inc., Employer and South Carolina Chamber Fund/Sedgwick James of the Carolinas, Carrier,

Respondents.

Appeal From Anderson County
Thomas J. Ervin, Circuit Court Judge

Opinion No. 3298
Heard October 12, 2000 - Filed February 20, 2001

AFFIRMED

Richard E. Thompson, Jr., of Thompson & King, of Anderson, for appellant.

Wm. Douglas Gray and Reginald M. Gay, both of Watkins, Vandiver, Kirven, Gable & Gray, of Anderson, for respondents.

STILWELL, J.: In a decision affirmed by the workers' compensation commission and the circuit court, the single commissioner found Perry W. Lockridge was not entitled to benefits, concluding his heart attack was not an injury by accident arising out of and in the course of his employment. Lockridge appeals. We affirm.

BACKGROUND

In February 1994, Santens of America, a manufacturer of towels, hired Lockridge as a lead man on the weekend shift. A lead man is responsible for mixing dyes and chemicals and operating the dye machine. Operating the dye machine requires the lead man to lift buckets and bags weighing fifty to fifty-five pounds each.

In November 1994, Lockridge experienced heart problems requiring angioplasty. By December 1994, Lockridge had returned to work as a lead man on the weekend shift. Between January and June of 1995, the plant closed eleven weeks due to a slowdown in production. In July 1995, Lockridge was promoted to department head of the dyehouse, a weekday job that also required him to report to work on Saturday. In this position, Lockridge supervised the lead men, performed inventory counts, and checked the dye colors. Lockridge's job essentially consisted of office work, and he no longer lifted buckets and bags of chemicals.

On October 14, 1995, Lockridge planned to go to the plant for a shift change and to check the dye. The lead man scheduled for the 11:00 a.m. to 11:00 p.m. shift could not work, and Lockridge was unable to get a replacement lead man to report until 3:00 p.m. Lockridge had decided to close down the dyeing operation between 11:00 a.m. and 3:00 p.m., but the plant manager persuaded Lockridge to fill in as the lead man during that time frame.

Lockridge worked the four hour shift for the dyeing operation utilizing four vats and two dryers. When Lockridge worked as a lead man prior to his

promotion, he operated only three vats and one dryer. Lockridge lifted between 1600 and 3000 pounds of chemicals during the shift.

As he worked, Lockridge became extremely tired, began sweating, and developed pain in his neck and jaw. He also experienced shortness of breath and soreness between his shoulders. Although Lockridge originally intended to stay at the plant until 5:00 p.m., the onset of these symptoms caused him to return home as soon as the replacement lead man arrived at 3:00 p.m.

Throughout the evening, Lockridge continued to experience symptoms and eventually was transported to the emergency room at Anderson Area Medical Center where he was diagnosed as having sustained a heart attack. Lockridge was then transferred to Greenville Memorial Hospital where he underwent quadruple bypass heart surgery. Lockridge was fifty-eight years old at the time of the heart attack.

Following his operation, Lockridge returned to work at Santens in various capacities but was terminated in December 1996 for reasons not involved here and has not been employed since.

In denying Lockridge's claim, the single commissioner concluded he did not suffer an injury by accident arising out of and in the course of employment. Moreover, the commissioner found Lockridge's heart attack was not caused or induced by unexpected strain or overexertion in the performance of his job duties or by unusual or extraordinary conditions in his employment on October 14, 1995. The full commission determined that all of the single commissioner's findings of fact and rulings of law were correct as stated, affirmed the hearing commissioner, and adopted his decision as its own. The circuit court affirmed the full commission.

SCOPE OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Any review of the

commission's factual findings is governed by the substantial evidence standard. Smith v. Squires Timber Co., 311 S.C. 321, 325, 428 S.E.2d 878, 880 (1993). The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached. Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994); Gray v. Club Group, Ltd., 339 S.C. 178, 183, 528 S.E.2d 435, 440 (Ct. App. 2000).

Furthermore, neither this court nor the circuit court may substitute its judgment for that of the agency as to the weight of the evidence on questions of fact but may reverse if the decision is affected by an error of law. See S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2000); Gibson v. Florence Country Club, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 516, 526 S.E.2d 725, 728 (Ct. App. 2000). See also Oglesby v. Greenville YWCA, 250 S.C. 490, 494, 158 S.E.2d 907, 909 (1968) ("Under our workmen's compensation law the Commission sits in lieu of a jury and neither the Circuit Court nor this Court may interfere with its findings of fact unless there is an absence of evidence to sustain the findings of the Commission.").

DISCUSSION

I. Expert Medical Testimony

A. Testimony of Dr. Gaucher

Lockridge argues the commission erred by misconstruing Dr. Jay Gaucher's deposition testimony as to the cause of Lockridge's heart attack. We disagree.

Doctor Gaucher, a cardiologist, first treated Lockridge for the heart attack on October 18, 1995. Doctor Gaucher testified that, according to a cardiac

catheterization report on Lockridge when he was treated at Anderson Area Medical Center, Lockridge had multi-vessel heart disease with total occlusion of his left anterior descending artery and a ninety-nine percent blockage in his right coronary artery with angiographic evidence of ruptured plaque in that artery. Doctor Gaucher explained that plaque is cholesterol and when it ruptures or cracks, the plaque causes clots to form in the artery which, in turn, gives rise to heart attacks. Doctor Gaucher testified the plaque rupture likely occurred at the time of the onset of Lockridge's symptoms.

During direct examination regarding causation, Dr. Gaucher testified that the direct cause of Lockridge's heart attack was plaque rupture in the right coronary artery. In response to the inquiry if he had an opinion whether the plaque rupture was induced or caused by unexpected strain or overexertion in Lockridge's job, Dr. Gaucher answered:

> Well, I don't – All I can say is that plaque rupture is very unpredictable. Coronary artery disease is a chronic condition and very unpredictable. Plaque rupture can occur at any time. In fact it quite often happens at rest, most commonly in the early morning hours, and I don't think that we really understand or know the precipitance of plaque rupture. But it's a chronic . . . disease, and, and it's unpredictable and plaque rupture can occur. So I, I don't know if there's a direct – I don't, don't know if a direct implication can be made with any certainty.

Upon further questioning as to whether a causal connection existed between Lockridge's employment and the heart attack, Dr. Gaucher responded:

> So I did not question [Lockridge] about the – his activities at the time of his symptoms and so forth. So it's in some ways maybe a little bit unfair to ask me that particular question. But what I know, again, from heart disease is that plaque rupture is unpredictable and can occur at any time, and we don't know the precipitance or understand the precipitance. Heart attacks most often occur without physical exertion.

Doctor Gaucher concluded by unequivocally stating that he could not give an opinion with any degree of medical certainty because of the unpredictable nature of the process.

Lockridge argues the inference to be drawn from Dr. Gaucher's testimony is Lockridge's heart attack directly resulted from a plaque rupture which occurred when he began experiencing symptoms while overexerting himself in working as a lead man. However, the single commissioner concluded otherwise, summarizing "Dr. Gaucher testified that he could not say within a reasonable degree of medical certainty that [Lockridge's] heart attack was causally related to the physical activity engaged in by [Lockridge] on October 14, 1995." The full commission adopted the findings of the commissioner.

B. Testimony of Dr. Walker

Lockridge relies on the deposition testimony of Dr. William Walker in arguing there is no substantial evidence in the record to support the commission's findings regarding causation. Doctor Walker, a pulmonary internist, first treated Lockridge in 1989 for a physical examination and each year thereafter for several years. Doctor Walker's partner, Dr. Samuel Burnett, admitted Lockridge to the hospital for the October 1995 heart attack. During direct examination regarding the cause of Lockridge's heart attack, Dr. Walker testified as follows:

> Attorney: Alright (sic), sir. Based on the patient's history that he gave you, are you aware of the case of the cause of the heart attack which he had on October 15th of '95?
>
> Walker: I heard that it had to do with something about his job, that he was doing something different. He was home and they called him in. He had to do something he wasn't used to or something. And he tried to help them out and he didn't do well after that.
>
> Attorney: Was that information related to you by Mr. Lockridge?

Walker: Yes.

Thereafter, in response to a hypothetical question posed by Lockridge's attorney, which was objected to by Santens' attorney, Dr. Walker stated he "would think" to a reasonable degree of medical certainty that Lockridge's heart attack was causally related to Lockridge lifting the bags of chemicals.

Lockridge argues Dr. Walker's testimony is uncontradicted and, therefore, the commission erred in concluding the heart attack was not caused by Lockridge's physical exertions on the job. We disagree.

While Dr. Walker may have attributed the cause of Lockridge's heart attack to overexertion at work, Dr. Gaucher either would not or could not. Thus, to the extent Dr. Gaucher's testimony contradicts Dr. Walker's testimony, the commission was free to weigh the conflicting evidence accordingly. Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("Where there is a conflict in the evidence, the Commission's findings of fact are conclusive."); see also Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) (acknowledging that despite conflicting evidence, either of different witnesses or of the same witness, a finding of fact by the commission is conclusive). The final determination of witness credibility and the weight to be accorded evidence is reserved to the full commission, and it is not the task of the court to weigh the evidence as found by the commission. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). Furthermore, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Once admitted, expert testimony is to be considered just like any other testimony." Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) (citations omitted). Given the conflicting testimony as to the precipitation of Lockridge's heart attack and our scope of review, we find substantial evidence in the record to support the commission's findings regarding causation.

II. Lockridge's Job Responsibilities

Lockridge also contends the commission erred in finding part of Lockridge's job responsibilities as department head included filling in for an absent lead man. We disagree.

Lockridge testified that after his promotion to department head, he was no longer routinely required to lift the buckets and bags of chemicals. Moreover, he testified he could not remember the former department head ever filling in for a lead man. In fact, Lockridge stated the plant closed down on occasions when a lead man was not present. However, he also testified that as department head he was expected to fill in for an absent lead man.

John Williams, Lockridge's successor as department head, testified that at the time of Lockridge's heart attack in 1995, the department head was expected to fill in for an absent lead man. He also stated that he had filled in for absent lead men, and it was an ordinary part of the department head's job. Williams did admit he could not remember Lockridge ever having to lift anything between the time he became department head until the day of his heart attack.

Based on the evidence presented regarding Lockridge's job history, the commissioner concluded the work Lockridge was performing at the time of his heart attack was "neither unusual in light of his regular job duties or extraordinary." The full commission adopted these findings.

As previously stated, our review of the commission's factual findings is governed by the substantial evidence standard. Smith, 311 S.C. at 325, 428 S.E.2d at 880. Where there is conflicting testimony, the commission's findings of fact are conclusive. Brayboy v. Clark Heating Co., 306 S.C. 56, 58, 409 S.E.2d 767, 768 (1991). Accordingly, we find no error in the commission's finding that Lockridge's ordinary job responsibilities included filling in for an absent lead man.

Lockridge also argues the commission erred in holding that under S.C. Code Ann. § 42-1-160 (Supp. 2000), and case law, the test for compensability due to heart attacks caused by unexpected strain or overexertion or by unusual and extraordinary conditions of employment is based on the responsibility of an employee, rather than the physical effort the employee generally performs. Lockridge contends even if the test is based on an employee's responsibilities, the commission erred in failing to recognize Lockridge met the test. We disagree.

The general rule is that a heart attack is compensable as a worker's compensation accident if it is induced by unexpected strain or overexertion in the performance of the duties of claimant's employment or by unusual and extraordinary conditions of employment. Hoxit v. Michelin Tire Corp., 304 S.C. 461, 464, 405 S.E.2d 407, 409 (1991). Various extreme conditions have been considered sufficient to support a finding that an accident resulted from unexpected strain or overexertion or from unusual and extraordinary conditions of employment. See, e.g., Stokes, 306 S.C. 46, 410 S.E.2d 248 (extreme increase in work hours coupled with increased responsibilities resulting in nervous breakdown); Powell v. Vulcan Materials Co., 299 S.C. 325, 384 S.E.2d 725 (1989) (unexpected, serious altercation with employee's supervisor resulting in mental disorder); Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990) (climb of an eighty-seven foot ladder in extreme heat resulting in heart attack).

However, where a claimant cannot prove the heart attack was induced by unexpected strain or overexertion in the performance of employment duties or by unusual and extraordinary conditions of employment, there is no injury by accident compensable under section 42-1-160. See Hoxit, 304 S.C. at 464-65, 405 S.E.2d at 409 (applying the substantial evidence standard of review in affirming the commission's factual finding that a claimant's heart attack was not compensable since it did not result from unexpected strain or overexertion or unusual and extraordinary conditions of his employment); Jennings v. Chambers Dev. Co., 335 S.C. at 258-59, 516 S.E.2d at 458-59 (Ct. App. 1999) (upholding the commission's factual finding that a claimant's ruptured aneurysm was not a work-related injury where there was no evidence anything unusual or

unexpected, requiring abnormal exertion, occurred on the day of employee's death).

Lockridge cites several cases in his brief in support of his argument that the case law draws a distinction between the physical effort the employee generally performs and the employee's usual job responsibility when examining what is an unexpected strain or unusual and extraordinary conditions of employment resulting in a heart attack.[1] However, the cases on which Lockridge relies do not seem to draw such a fine distinction. Instead, these cases suggest that our standard of review governs the outcome on appeal of these factually driven cases.[2]

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[1] In support of his argument, Lockridge relies on Canady v. Charleston County Sch. Dist., 265 S.C. 21, 216 S.E.2d 755 (1975) (affirming full commission's factual finding that an employee, who had been required to work two nights a week in addition to his normal janitorial duties, had suffered a heart attack that was induced by unexpected strain and overexertion in the performance of his employment duties); McWhorter v. South Carolina Dep't of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969) (affirming full commission's factual finding that an employee, who experienced an extreme increase in work hours, great mental stress, lack of sleep, time pressure and physical exertion on the job, had suffered a heart attack that was induced by overexertion in the performance of his duties due to unusual or extraordinary conditions in his employment); Ricker v. Village Mgmt. Corp., 231 S.C. 47, 97 S.E.2d 83 (1957) (affirming the full commission's factual finding that an employee, a bus driver who experienced considerable physical strain in making a sharp turn during heavy traffic on a hot day, had experienced unusual exertion or strain during the course of his employment, which aggravated the employee's heart condition and resulted in a heart attack).

[2] Canady, 265 S.C. at 25, 216 S.E.2d at 757 (refusing to reverse the decision of the commission since there was competent evidence to support its factual findings); McWhorter, 252 S.C. at 98, 165 S.E.2d at 368 (same); Ricker, 231 S.C. at 55, 97 S.E.2d at 87 (finding evidence to support the factual findings of the commission).

There is conflicting evidence in the record as to Lockridge's responsibility in filling in for an absent lead man. Moreover, the testimony of Dr. Gaucher and Dr. Walker conflicts as to whether Lockridge's heart attack resulted from unexpected strain or overexertion or from unusual and extraordinary conditions of employment. In resolving these factual issues, the commissioner concluded Lockridge's "heart attack was not caused or induced by unexpected strain or overexertion in the performance of [his] duties of his employment [n]or by unusual and extraordinary conditions in the employment . . . ." The commission adopted the commissioner's findings. Where there is a conflict in the evidence, the commission's findings of fact are conclusive. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Hoxit, 304 S.C. at 465, 405 S.E.2d at 409. There is substantial evidence in the record to support the commission's findings. Accordingly, the order of the circuit court order is

AFFIRMED.

HOWARD and SHULER, J.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Property and Casualty Guaranty Association and Jackie Cooper Ford, Inc.,

Plaintiffs,

v.

Richard Scott Yensen, Michael Price Barnhill, State Farm Mutual Automobile Insurance Company, Nationwide Insurance Company, Jefferson-Pilot Fire & Casualty Company, Jackie B. Cooper, J. Daniel Cooper, Mark Cooper, Guy Moross, Theodore Huttner, Midland Risk Insurance Company, and The Insurance Reserve Fund of South Carolina,

Defendants,

of whom Richard Scott Yensen and Michael Price Barnhill are,

Appellants

and South Carolina Property and Casualty Guaranty Association, State Farm Automobile Insurance Company, and Jefferson-Pilot Fire & Casualty Company, are,

Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3299
Heard January 9, 2001 - Filed February 20, 2001

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein; and Jerry N. Theos, of Uricchio, Howe, Krell, Jacobson, Toporek & Theos, both of Charleston, for appellant.

G. Mark Phillips, of The Hood Law Firm; Henry E. Grimball, of Buist, Moore, Smythe & McGee, both of Charleston; and Hoover C. Blanton and Ruskin C. Foster, both of McCutchen, Blanton, Rhodes & Johnson, of Columbia, for respondent.

HEARN, C.J: This is a declaratory judgment action involving issues of automobile insurance coverage among three insurers. The trial court granted summary judgment to Jefferson Pilot Fire and Casualty Company (Jefferson Pilot) and a directed verdict to South Carolina Property and Casualty Guaranty Association (Guaranty Association) and State Farm Insurance Company (State Farm). Richard Scott Yensen and Michael Price Barnhill appeal. We affirm with respect to Jefferson Pilot and State Farm, and reverse and remand with respect to Guaranty Association.

FACTS AND PROCEDURAL BACKGROUND

On June 15, 1991, Yensen's Camaro became disabled on Interstate 26 in Charleston County. The Camaro was on the shoulder of the highway. Yensen walked to a pay phone and called the highway patrol. Yensen was picked up by Officer Barnhill.

Yensen and Barnhill returned to Yensen's car. Barnhill parked his patrol car behind the Camaro and summoned a tow truck. A flatbed wrecker belonging to Specialty Towing arrived, and the driver of the wrecker parked in front of the Camaro to hook it up for towing. Yensen and Barnhill exited the patrol car and stood beside the driver's side of the Camaro while the tow truck driver hooked chains to it.

Theodore Huttner was driving a Chevrolet Beretta on Interstate 26 traveling toward Charleston. Huttner struck Yensen, Barnhill, and the tow truck driver, injuring them. Huttner did not stop, but was apprehended nearby after he ran off the road. The Beretta was owned by Huttner's employer, Jackie Cooper Ford Inc. (Jackie Cooper). Yensen and Barnhill subsequently filed negligence actions against Huttner. Yensen received a $900,000 verdict and Barnhill received an $85,000 verdict.

At the time of the accident, Specialty Towing was insured by Jefferson Pilot. Huttner owned a motorcycle and a van which were insured by State Farm. Jackie Cooper was insured by First Southern Insurance Company.[1] The trial judge granted summary judgment to Jefferson Pilot and directed verdicts in favor of State Farm and Guaranty Association.

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[1] First Southern was later placed into receivership and liquidated. In its place, the South Carolina Property and Casualty Guaranty Association took over handling of these claims.

DISCUSSION

I. Jefferson Pilot

Depending upon whether or not Huttner was a permissive driver of the Beretta, Yensen and Barnhill assert they are entitled to either uninsured or underinsured motorist coverage as insureds under the Jefferson Pilot policy. The policy provided both uninsured or underinsured motorist coverage of $300,000 to Specialty Towing. The policy defined "insured" as "anyone else 'occupying' a covered auto." According to the policy, "occupying" was defined as "in, upon, getting in, on, out or off."

The trial court granted summary judgment to Jefferson Pilot. The court concluded neither Yensen nor Barnhill was an insured under the policy because neither was "occupying" the tow truck as defined by the policy. Yensen and Barnhill argue the trial court erred as a matter of law in granting summary judgment to Jefferson Pilot because they were involved with the tow truck at the scene and were injured as a result of its "use."

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 463 S.E.2d 618 (Ct. App. 1995), rev'd in part on other grounds, 327 S.C. 238, 489 S.E.2d 470 (1997). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Viewing the evidence in the light most favorable to them, Officer Barnhill and Yensen were sitting in Barnhill's patrol car preparing an accident report for Yensen's Camaro when the tow truck arrived. The tow truck driver began hooking chains to Yensen's Camaro. Barnhill advised Yensen to retrieve his personal items from the car before it was lifted onto the tow truck. Both Barnhill and Yensen exited the patrol car and went to the driver's side of the Camaro. They were standing on the driver's side near the rear view mirror when Huttner struck them. In his deposition, Yensen testified he had called a friend to come pick him up. However, he also testified that he was planning to leave the scene with the tow truck driver. It is this testimony which Yensen asserts constitutes a genuine issue of material fact sufficient to survive summary judgment. Barnhill's position is that because he was acting in his official capacity of supervising the attachment of the Camaro to the tow truck, he was "occupying" the tow truck. We disagree with both assertions.

The trial judge correctly determined that Yensen and Barnhill were not insureds under the Jefferson Pilot policy. They were not occupying the tow truck as the policy defines that term.[2] Under the plain meaning of the words, neither Yensen nor Barnhill was "in, upon, getting in, on, out or off" the tow truck. While there was some testimony that Yensen intended to leave the scene in the tow truck, at the time of the accident, he was not in or on the tow truck, nor was he in the process of getting into it.

Further, under Whitmire, 254 S.C. at 187-92, 174 S.E.2d at 393-95, we do not find Yensen to have been alighting from the tow truck. Whitmire held that where a passenger was struck while within two or three feet of the car he had immediately "alighted from," that passenger may collect uninsured motorist coverage from the insurer of the car he had been riding in. Id. at 191-

[2] See McAbee v. Nationwide Mut. Ins. Co., 249 S.C. 96, 152 S.E.2d 731 (1967)(discussion of term "upon" as synonymous with "contact with"); Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 174 S.E.2d 391 (1970)(term "alighting from" extends to a situation where the body has reached a point where there is no contact with the vehicle).

92, 174 S.E.2d at 394-95. Appellants argue that Whitmire is controlling in this case because Yensen intended to occupy the tow truck and should therefore be able to collect insurance from the tow truck's insurance provider. Whitmire is distinguishable because there, the plaintiff had unquestionably been occupying the car, whereas this case involves, at most, Yensen's *intent* to occupy the tow truck, expressed after the accident and during litigation. We are reluctant to extend Whitmire to these facts because Yensen was not "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." Id. at 191, 174 S.E.2d at 394.

Appellants' reliance upon Merck v. Nationwide Mut. Ins. Co., 318 S.C. 22, 455 S.E.2d 697 (1995) is unavailing. That case dealt with the issue of stacking of underinsured motorist coverage. In Merck, the insured's disabled vehicle was on a tow truck in the emergency lane. Id. at 23-24, 455 S.E.2d at 698. The insured was standing beside the tow truck with the tow truck driver when an intoxicated driver ran off the road, striking the insured, the tow truck driver, and the tow truck. Id. The supreme court affirmed this court's conclusion that the insured's vehicle was "involved in the accident" because it was present at the scene, and the accident had an effect on it when the car was thrown from the wrecker. Id. at 24, 455 S.E.2d at 698. In Merck, uninsured coverage on the tow truck was not an issue as it is in this case. Rather, Merck dealt with whether the victim's own vehicle was "involved in the accident," an issue not disputed here where all parties agree that Yensen's vehicle was involved in the accident. Moreover, in Merck the policy and S.C. Code Ann. section 38-77-160 (1989), provided coverage to vehicles "involved in the accident," while here, coverage is afforded to individuals "occupying the vehicle."

Appellants also argue they should collect under the Jefferson Pilot policy because they were "involved" with the tow truck at the time of their injuries, citing State Farm Mut. Auto. Ins. Co. v. Bookert, 330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1998). This reliance is misplaced. In Bookert, a gunman riding in a vehicle shot and injured a pedestrian. This court held the pedestrian could collect underinsured motorist insurance coverage from his policy because his injury arose out of the gunman's use of his own vehicle, making the

gunman's vehicle an "active accessory" to the crime. Id. at 230-31, 523 S.E.2d at 485. In both Bookert and its predecessor Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992), this court and the supreme court stated that the gunman's vehicle was an "active accessory" to the crime where there was a sufficient causal connection between the gunman's use of his vehicle and the other party's injuries. Bookert, 330 S.C. at 231, 523 S.E.2d at 485; Howser, 309 S.C. at 273, 422 S.E.2d at 108. Appellants seek to apply this reasoning to this case, suggesting the gunman's vehicle is akin to the tow truck in this case. However, unlike the shooter's use of his vehicle in Bookert and Howser, Huttner did not use the tow truck in any way that could be construed to make the tow truck an "active accessory" to this accident. In fact, Huttner had no contact with the tow truck, either before or after the accident. Further, there is no causal connection between the tow truck and the injuries Yensen and Barnhill suffered.[3]

In our view, neither Yensen nor Barnhill was occupying the tow truck as that term is defined in the policy. Accordingly, we affirm the trial court's grant of summary judgment.

II. State Farm

State Farm insured both a motorcycle and a van owned by Huttner. The State Farm policies provided liability coverage to Huttner to use other cars, specifically defined as a newly acquired car, a temporary substitute car, or a non-owned car. The trial judge granted a directed verdict to State Farm concluding the Beretta was not a newly acquired car, a temporary substitute car, or a non-owned car as defined by the State Farm policies.

In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most

[3] Both Yensen and Barnhill were struck directly by Huttner's Beretta. Neither one was injured by the tow truck in any way.

favorable to the party opposing the motions. Adams v. G.J. Creel & Sons, 320 S.C. 274, 465 S.E.2d 84 (1995). The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. Id. The appellate court will reverse the trial court only when there is no evidence to support the ruling below. Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

Yensen and Barnhill contend the trial court erred in granting a directed verdict. They argue there is more than one reasonable inference to be drawn from the facts as to whether Huttner had permission from Jackie Cooper to drive the Beretta. They also argue State Farm's policy language contravenes South Carolina's mandatory insurance requirements by limiting the circumstances in which State Farm provides liability coverage for non-owned vehicles.

(a)

The State Farm policies state "the liability coverage extends to use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car." Yensen and Barnhill argue this contractual language violates South Carolina's mandatory insurance requirements, relying upon State Auto Property and Casualty Insurance Co. v. Gibbs, 314 S.C. 345, 444 S.E.2d 504 (1994).

Yensen and Barnhill cite language in Gibbs which states, "South Carolina law is clear that liability to third parties under an owner's automobile liability policy is absolute when injury occurs." Id. at 349, 444 S.E.2d at 506 (citing S.C. Code Ann. §56-9-20 (7)(b)(1) and (b)(3) (Supp. 1999)). The supreme court made this statement in the context of its discussion of an exclusion contained in a non-owner's insurance policy. The court referenced specific statutes defining a motor vehicle liability policy. See S.C. Code Ann.§56-9-20(5) and 5(b) (Supp. 1999). In the language of section 56-9-20, a motor vehicle liability policy is one that meets the requirements of sections 38-77-140 through 230. Yensen and Barnhill apply the language from Gibbs out

of context because the case deals with statutorily required coverage. Liability coverage for non-owned vehicles is not statutorily required in this state and is provided by a voluntary contract between the insurer and the insured. Jackson v. State Farm Mut. Auto. Ins. Co., 288 S.C. 335, 337, 342 S.E.2d 603, 604 (1986). Accordingly, the parties may choose their own terms regarding coverage for non-owned vehicles. Id. Therefore, Gibbs is not applicable, and the State Farm policies do not violate South Carolina's mandatory insurance requirements.

(b)

The State Farm policies provide "the liability coverage extends to use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car." The parties do not contend the Beretta was a "newly acquired car." Thus, our only determination is whether the Beretta was a temporary substitute car or a non-owned car. We agree with the trial court that it was neither.

The State Farm policies define a temporary substitute car as "a car not owned by you or your spouse, if it replaces your car for a short time. Its use has to be with the consent of the owner. Your car has to be out of use due to its breakdown, repair, servicing, damage or loss." While Yensen and Barnhill have argued Huttner had permission to use the Beretta, they did not specifically address the trial court's additional ruling that there was no reliable evidence Huttner's motorcycle or van was out of use due to breakdown or servicing. Based upon their failure to address this additional ruling, we affirm the trial court. See Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996)(where the ruling of the trial judge is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds).

The State Farm policies define a "non-owned car" as "a car not owned by or registered or leased in the name of: (4) an employer of you, your spouse or any relative." (emphasis added) Based upon this definition, the Beretta did not qualify as a non-owned car because it was owned by Huttner's employer, Jackie Cooper. Under the policy definition, coverage was excluded

regardless of whether Huttner had permission from Jackie Cooper to drive the Beretta.

Accordingly, we affirm the trial judge's finding that State Farm was entitled to a directed verdict.

III. Guaranty Association

Finally, Yensen and Barnhill contend the trial court erred in granting a directed verdict to Guaranty Association. They assert there is a question of fact as to whether Huttner had permission from Jackie Cooper to drive the Beretta.

Huttner worked in the body shop at Jackie Cooper. Initially, he was hired as "just a body man," but Huttner testified that he later took over as "manager". While working at Jackie Cooper, Huttner often drove cars he was working on for business purposes such as to pick up parts or to test drive them. He testified he also "kind of" drove cars for pleasure. He usually asked Jim Dill, a Jackie Cooper manager, for permission to drive a vehicle. Huttner admitted he had driven company cars out of town before, but not as far as Charleston. Huttner had access to the key and had used the Beretta before to pick up parts.

On the day of the accident, Huttner left work around 5:00 p.m. on June 14, 1991. He had driven his truck to work that day. Huttner decided to drive to Charleston that night to see his family and possibly locate some parts for the Beretta. Although Huttner did not ask for permission to drive the Beretta, he did not feel there was a problem for him to use the car, since he occasionally used Jackie Cooper cars. Huttner stated that as far as he was concerned he had permission to drive the Beretta.

State Trooper Barry Watson investigated the Yensen/Barnhill accident after Huttner was arrested for felony DUI. According to Watson,

Huttner made conflicting statements about whether he had permission to drive the Beretta. Watson initially charged Huttner with use of a vehicle without the owner's consent after Watson spoke to Jim Dill at Jackie Cooper and was told Huttner did not have permission to use the car. However, that charge was dropped after Watson spoke to Jackie Cooper. Watson testified Cooper stated Huttner had both access and consent to drive cars he was working on.

Viewing the evidence in the light most favorable to Yensen and Barnhill, more than one reasonable inference can be drawn from the evidence on the issue of permission. Accordingly, we conclude the trial court erred in granting a directed verdict to Guaranty Association and reverse and remand for a hearing on this issue.

CONCLUSION

We affirm the grant of summary judgment to Jefferson Pilot and the grant of a directed verdict to State Farm. We reverse the grant of a directed verdict to Guaranty Association and remand to the trial court for further proceedings.[4]

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

CURETON and CONNOR, JJ., concur.

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[4] Yensen and Barnhill argue the trial court erred in not allowing them to include certain portions of the deposition of a witness, Terry Meade, in the record on appeal. Substitution of deposition testimony was necessary after the trial testimony of Meade was lost. We find no reversible error. The appellants failed to proffer the omitted deposition material for this court's examination and have therefore demonstrated no prejudice to this court. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(the failure to make a proffer of excluded evidence will generally preclude review on appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Ferguson, individually and on behalf of the Estate of Howard D. Ferguson and on behalf of all others similarly situated,

Appellants,

v.

Charleston Lincoln/Mercury, Inc.,

Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
Daniel E. Martin, Sr., Circuit Court Judge

Opinion No. 3300
Heard December 12, 2000 - Filed February 20, 2001

AFFIRMED IN PART AND REMANDED IN PART

Justin Lucey, John G. Brown, II, Justin O'Toole Lucey and M. Lee Robertson, all of Mount Pleasant, for appellants.

Henry E. Grimball, of Buist, Moore, Smythe & McGee, of Charleston, for respondent.

CURETON, J.: Howard Ferguson (Mr. Ferguson) sued Charleston Lincoln/Mercury, Inc. (CLM) for engaging in unfair or deceptive trade practices during his purchase of an automobile from a CLM dealership. Mr. Ferguson died during the pendency of the action, but his wife, Patricia, continued to prosecute the action in his stead. She also sought class action certification. The trial court granted summary judgment to CLM and ruled the request for class certification was moot. We affirm in part and remand in part.

FACTS

On January 17, 1997, Mr. Ferguson purchased a used 1993 Mercury Sable automobile from North Charleston Hyundai, an automobile dealership owned and operated by CLM. Patricia accompanied him during the purchase, but did not participate in all of the negotiations. After arriving at a price with a salesperson, Mr. Ferguson purchased the car by tendering a $200 down payment and signing a "Buyers Order" and a "Retail Installment Loan and Security Agreement" (Security Agreement).

The Buyers Order listed the car's "cash price" as $8,873.19. It then adjusted the cash price by several enumerated charges and credits to arrive at the amount to be financed, $8,491.69.[1]

The Security Agreement indicates that Eagle Finance Corporation would finance the $8,491.69. Although the Security Agreement correctly stated the amount to be financed ($8,491.69), it did not accurately reflect the calculation made by the Buyers Order. Specifically, it misstated the cash price and did not enumerate the $189.50 closing fee.

Mr. Ferguson took possession of the car on the night he bought it. After

[1] This figure was arrived at by deducting $900 in credits (a $700 trade-in allowance and a $200 down payment) from the cash price then adding $518.50 in costs ($300 in state sales tax, $29 tag and title fee, and a $189.50 "closing fee").

driving it for several weeks, he noticed he had not received a payment book and contacted CLM who referred him to Eagle Finance. Eagle informed Mr. Ferguson that it could not process the loan due to errors in the purchase documents and that he would have to return to the CLM dealership and execute new documents in order to complete the transaction. According to Patricia, Mr. Ferguson told her that CLM wanted "to put in a fee . . . [and] get more money out of us " which he refused to do. Shortly thereafter, CLM repossessed the vehicle.

Mr. Ferguson filed the instant action in 1997, but died during its pendency. Patricia was substituted as plaintiff by way of a consent order filed September 25, 1998.

On November 19, 1998, the trial court issued an order compelling discovery. Thereafter, the defendants moved for summary judgment on the merits which was granted by order filed January 15, 1999. The grant of summary judgment rendered the class certification issue moot. This appeal followed.

LAW/ANALYSIS

Mr. Ferguson brought the instant action pursuant to the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealer's Act). S.C. Code Ann. §§ 56-15-10 to -130 (1991 & Supp. 2000). In pertinent part, the Dealer's Act states:

> Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful.

S.C. Code Ann. § 56-15-30(a) (1991).[2] The Act allows an injured party to recover money damages for violations of the Act. S.C. Code Ann. § 56-15-110 (1991).

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[2] We do not view Mr. Ferguson's arguments as encompassing the contention that CLM's actions constituted unfair methods of competition.

I. Survivability

In its brief, CLM argues, as an additional sustaining ground, that we should affirm the trial court's ruling because this action did not survive Mr. Ferguson's death. We agree.

"Under the present rules [of appellate practice], a respondent - the 'winner' in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), [SCACR]."

"A cause of action created by statute survives when and only when some provision for its survival is made in the statute itself, or in some other statute." 1 C.J.S. Abatement and Revival §151, at 206 (1985); see 1 Am. Jur. 2d Abatement, Survival, and Revival §53 (1994). Therefore, to determine the survivability of the instant action, we must look to South Carolina's general survival statute, S.C. Code Ann. § 15-5-90 (1976), and the Dealer's Act itself.

A. *General Survival Statute - Section 15-5-90*

At common law, a personal action *ex delicto* did not survive the death of either party. Bennett v. Spartanburg Ry. Gas & Elec. Co., 97 S.C. 27, 81 S.E. 189 (1914). However, the common law prohibition was partially abrogated around the turn of the last century with the enactment of a survival statute for actions involving injuries to real estate. Rev. Stat. § 2323 (1894) ("Causes of action for and in respect to any and all injuries and trespasses to and upon real estate shall survive both to and against the personal or real representative (as the case may be) of deceased persons . . . any law or rule to the contrary notwithstanding."). The scope of the first survival statute was expanded in 1905 to include "any and all injuries to the person or to personal property . . . ." S.C. Code of 1912 § 3963 (Civ. Code). The statute has survived with little change to the present day:

> *Causes of action for* and in respect to any and all injuries and trespasses to and upon real estate and *any and all injuries to the person or to personal property shall survive* both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90 (1976) (emphasis added).

Generally, "[a]ny cause of action which could have been brought by the deceased in his lifetime survives to his representative under [section 15-5-90]." Layne v. Int'l Bhd. of Elec. Workers Local 382, 271 S.C. 346, 352, 247 S.E.2d 346, 350 (1978). However, despite section 15-5-90's broad language, our supreme court recognizes several exceptions to it for actions involving malicious prosecution, slander, and fraud and deceit. Id. at 349 & 349 n.2, 247 S.E.2d at 349 & 349 n.2; see Brewer v. Graydon, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("It is interesting to note that with a liberal construction [of the general survival statute] this Court has held that actions for malicious prosecution, slander, and fraud and deceit do not survive . . . .").

Survivability is determined by the "nature and substance of the cause of action, rather than the form of the remedy . . . ." Ward v. Atlas Constr. Co., 276 S.C. 346, 349, 278 S.E.2d 621, 623 (1981); see Page v. Lewis, 203 S.C. 190, 26 S.E.2d 569 (1943). In the instant action, Ferguson essentially alleged that CLM fraudulently concealed the closing fee during the purchase and failed to disclose the fee on the associated loan documents. Because this action is based on a theory of fraud and deceit, it falls within the ambit of the fraud exception to the general survival statute. Accordingly, the instant action does not survive Mr. Ferguson's death by operation of section 15-5-90.

B. *Dealer's Act*

"Whether an action survives the death of a party must be determined by

looking towards the law, state or federal, under which the cause of action arose." 1 Am. Jur. 2d Abatement, Survival, and Revival § 53, at 110 (1994). Although this general rule has never been applied to a cause of action arising under the Dealer's Act, the courts of this state have applied the rule's rationale to other statutory actions.

In Estate of Covington v. AT&T Nassau Metals Corp., 304 S.C. 436, 405 S.E.2d 393 (1991), the Court held that a workers' compensation action did not survive the death of a claimant. After deciding the general survival statute, section 15-5-90, was inapplicable to an action brought pursuant to the South Carolina Workers' Compensation Act (Act), the Court analyzed the Act and found no statutory provision to support the survivability of the claim.[3]

This Court reached a similar conclusion in Reed v. Medlin, 284 S.C. 585, 328 S.E.2d 115 (Ct. App. 1985), overruled on other grounds by Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994), wherein it held that a statutory cause of action raised against the state did not survive the death of the injured plaintiff because the statutory scheme did not contain a survival provision. "[U]nless a statute specifically provides for survival of an action for personal injury, it does not lie after the injured person's death." Id. at 589, 328 S.E.2d at 118; cf. Layne, 271 S.C. at 352, 247 S.E.2d at 349 (holding that an action brought pursuant to the Right to Work Act survived because the party opposing survivability offered "no authority or precedent which would weigh against application of the general [survival] rule . . . .").

The Dealer's Act contains no survivability provision; therefore, the instant action does not survive Mr. Ferguson's death.

II. Class Certification

Ferguson argues the trial court erred in not certifying a class action since all the criteria for certification were met. We disagree.

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[3] Although the Act did not contain a survival provision applicable to the particular claim at issue in Estate of Covington, the Court noted that the Act does, in limited circumstances, provide for the survival of an action.

Usually, an order denying class certification is interlocutory and not immediately appealable. See Eldridge v. City of Greenwood, 308 S.C. 125, 126-27, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances."); Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (recognizing an order denying class certification as an interlocutory order). However, we may review an interlocutory order when, as now, it contains other appealable issues. Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998); see also Hite v. Thomas & Howard Co., 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) ("[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and *a ruling on appeal will avoid unnecessary litigation*.") (emphasis added), overruled on other grounds by Huntley v. Young, 319 S.C. 559, 462 S.E.2d 860 (1995).

The prerequisites of a class action are set forth in Rule 23, SCRCP:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) *the claims* or defenses *of the representative parties are typical of the claims* or defenses *of the class,* (4) *the representative parties will fairly and adequately protect the interests of the class,* and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP (emphasis added).

The proponent of class certification must prove each prerequisite of certification. Waller v. Seabrook Island Prop. Owners' Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990). "The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." Id. at 467, 388 S.E.2d at 801.

In as much as Mr. Ferguson's action does not survive, there is no

representative party to satisfy the third and fourth requirements. Accordingly, the trial court did not err in ruling that the issue of class certification was mooted by the dismissal of Ferguson's claim.

III. Discovery Costs

Ferguson also argues the trial court erred in ordering her to pay one-half of CLM's cost for producing the documents she had requested from CLM pursuant to Rule 34, SCRCP. As this issue has not been finally decided by the trial court, we remand it for such a determination.

As a general rule, a discovery order is not immediately appealable because it is an interlocutory order. Hamm v. South Carolina Pub. Serv. Comm'n, 312 S.C. 238, 439 S.E.2d 852 (1994). However, as we discussed above, an interlocutory order may be reviewed if it contains appealable issues which are properly before the court. Hite, 305 S.C. 358, 409 S.E.2d 340; Pruitt, 330 S.C. 483, 499 S.E.2d 250.

Ferguson asked CLM for copies of its dealership's buyers orders and security agreements pursuant to Rule 34, SCRCP. CLM provided Ferguson with copies of the buyers orders, then demanded a $30 per hour clerical fee plus $0.15 per page copying fee for all the copies it had already provided as well as any additional copies necessary to satisfy the Ferguson's discovery requests. Ferguson's counsel agreed to the charge.

On or about November 18, 1998, CLM invoiced Ferguson in the amount of $1,041.15 in discovery costs which included a $96.15 copying fee and a $945 clerical fee. Shortly thereafter, Ferguson challenged the amount of the clerical fee. By order dated November 19, 1998, the trial court ordered Ferguson to immediately pay CLM half of the invoiced fee, $520.57, but left the final determination of "the proper charge for the subject documents [to] be resolved by the trial judge."

Such a determination has never been made; therefore, the issue is remanded to the trial court.

CONCLUSION

For the foregoing reasons, the circuit court's order on appeal is

AFFIRMED IN PART AND REMANDED IN PART.

GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Horry County,

Respondent,

v.

The Insurance Reserve Fund, a division of the South Carolina Budget and Control Board, an agency of the State of South Carolina,

Appellant.

Appeal From Horry County
Steven H. John, Special Referee

Opinion No. 3301
Heard January 11, 2001 - Filed February 20, 2001

AFFIRMED

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, both of Richardson, Plowden, Carpenter & Robinson, of Columbia, for appellant.

G. Michael Smith, Phil Thompson and M. Mark McAdam, all of The Thompson Law Firm, of Conway, for respondent.

CURETON, J.: In this declaratory judgment action, the special referee found the Insurance Reserve Fund (the Fund) was contractually obligated, under the terms of a Tort Liability Insurance Policy, to indemnify Horry County for damage caused to neighboring property by a county-operated coquina mine.[1] The Fund appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

From 1984 until 1991, Horry County operated a coquina mine near Loris, South Carolina. In the course of operating the mine, the County continually pumped water from the mine pits. Otis Johnson, the owner of neighboring property, noticed problems on his property resulting from the operation of the mine. In 1989 the level of his irrigation pond dropped approximately ten feet. In 1991 Johnson discovered a 12- by 12-foot sink hole, open to a depth of five to six feet, in his field. Johnson alleged the water created further sink and chimney holes on his property, rendering his house uninhabitable. Johnson filed suit against Horry County alleging an inverse condemnation of his property. A jury awarded Johnson $300,000.

In 1994, neighboring property owners, Betty Johnson and Velma and Jerry Strickland also filed claims against the County alleging inverse condemnation. Betty Johnson alleged the County's operation of the mine caused sink and chimney holes on her property. Betty Johnson also alleged the operation of the mine caused cracks in the foundation of her house. The Stricklands alleged operation of the mine caused flooding on twenty acres of their property, resulting in severely damaged vegetation and timber. The County settled with Betty Johnson for $75,000 and with the Stricklands for $50,000.

Relying on the insurance policy, the County filed this declaratory judgment action seeking an order requiring the Fund to indemnify it for the

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[1] Coquina is "a soft whitish limestone formed of broken shells and corals cemented together and used for building." Merriam Webster's Collegiate Dictionary 256 (10th ed. 1993).

judgment and settlement amounts plus attorney fees and interest. By consent, the parties referred the matter to a special referee with finality. The referee concluded the policy provided coverage and ordered the Fund to indemnify the County.

STANDARD OF REVIEW

The standard of review in a declaratory judgment action is determined by the underlying issue or issues. Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991). The underlying issue in this action is the determination of coverage under an insurance policy. An action to ascertain whether coverage exists under an insurance policy is an action at law. State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). In an action at law, this court will not disturb the trial court's findings unless they are without any reasonable evidentiary support. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

LAW/ANALYSIS

I. Exclusion of inverse condemnation actions

The Fund contends inverse condemnation actions are outside the scope of coverage provided by the policy. We disagree.

> Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.

* * *

> The action is not based on tort, but on the constitutional prohibition of the taking of property without compensation.

29A C.J.S. Eminent Domain § 381 (1992).

The Fund first argues the purpose of the Fund is to provide liability insurance to South Carolina and its political subdivisions in light of the abolition of sovereign immunity. Thus, the Fund argues, the policy cannot provide coverage for any risk for which sovereign immunity has not been waived, such as inverse condemnation, because the government has never been immune from an action alleging a taking of private property. The Fund claims the only risks covered under the policy are those encompassed within the South Carolina Tort Claims Act.[2]

Our Supreme Court addressed this argument in Town of Duncan v. State Budget & Control Bd., 326 S.C. 6, 482 S.E.2d 768 (1997) with respect to a claim under the "Whistleblower Act," codified at South Carolina Code Annotated sections 8-27-10 to -50 (Supp. 2000). The Court concluded that the "duty to defend or indemnify should not be predicated on whether the Whistleblower action is covered by the Tort Claims Act. Rather, the policy itself should be examined to see whether coverage is provided by its terms." Town of Duncan, 326 S.C. at 12-13, 482 S.E.2d at 772.

The Fund, however, also argues the policy, entitled a "Tort Liability Insurance Policy," covers only actions arising in tort, thereby excluding coverage for inverse condemnation. The policy does not contain an exclusion for inverse condemnation nor does it define "tort."

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[2] S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2000).

Exclusions in an insurance policy are to be interpreted narrowly and to the benefit of the insured. McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993). Although the policy is entitled a "Tort" policy, it does not define a tort or exclude actions not sounding in tort, thus does not inherently exclude an action for inverse condemnation. In the absence of an express exclusion, the Fund's distinction between a claim based on tort liability and a claim based on inverse condemnation liability does not resolve the question of coverage under the policy. Rather, pursuant to Town of Duncan, 326 S.C. 6, 482 S.E.2d 768 and McPherson, 310 S.C. 316, 426 S.E.2d 770, we look to the terms of the policy itself to determine coverage.

II. The language of the policy

The Fund argues the language of the policy excludes coverage as there was neither "property damage" suffered, nor an "occurrence," as these terms are defined in the policy. We disagree.

A. "Property Damage"

The policy defines property damage as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Insurance policies are subject to the general rules of contract construction. Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 456 S.E.2d 912 (1995). Policy language is interpreted according to its plain, ordinary, and popular meaning. Id.

Otis Johnson and Betty Johnson suffered sink holes and chimney holes on their property. Otis Johnson lost use of his property; he was no longer able to live in his home due to cracks caused by the sink holes. Water from the mine

flooded Velma and Jerry Strickland's land. We find sink and chimney holes, cracks in a house's foundation, and flooding are within the ordinary meaning of physical injury to property. As the policy includes physical injury in the definition of property damage, we conclude this harm is clearly within the definition of property damage.

B. "Occurrence"

The Fund also argues that because the County intentionally operated the mine, the property damage was intentional, and therefore did not amount to an "occurrence." We disagree.

The policy provides:

> The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. Personal Injury or B. Property Damage to which this applies caused by an occurrence . . . .

Emphasis added. The policy specifically defines "occurrence" as:

> an accident, including continuous or repeated exposure to conditions, which result[s] in personal injury or property damage neither expected nor intended from the standpoint of the insured.

Emphasis added.

The policy definition of "occurrence" includes unexpected or unintended property damage caused by continuous or repeated exposure. The County's intentional operation of the mine does not equate to an intent by the County to cause property damage. There is no evidence in the record the County operated the mine to create sink holes or cause other property damage. Furthermore, the County's operation of the mine constituted continuous exposure to the

neighboring property owners. Employing the rule requiring this court to interpret an insurance policy provision according to its plain meaning, we conclude the damage to the neighboring property owners resulted from continuous exposure to the mine, and the damage was not intended by the County. See Diamond State, 318 S.C. at 236, 456 S.E.2d at 915.

The parties in this action are bound by the provisions of the policy as written. See Drafts v. Shull Sausage Co., 276 S.C. 52, 275 S.E.2d 577 (1981) (stating parties are bound by unambiguous terms of an insurance contract). We accordingly hold the special referee did not err in requiring the Fund to indemnify the County.

III. Title to the property

The Fund alternatively argues if there is coverage under the policy, the Fund is entitled to obtain fee simple title to the neighboring properties. The Fund argues the special referee erred in concluding the County did not acquire title to the neighboring properties. The Fund alleges the inverse condemnation award constituted a forced sale of the properties by the neighboring property owners to the County.[3] Thus, the Fund argues, it is entitled to an order requiring the County to deed the properties to the Fund. We find this argument is without merit.

Inverse condemnation actions do not constitute forced sales of property because such actions compensate property owners for the diminution in value to their property, not for the full value of the property. See Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000) (stating that the proper measure of damages for an injury of a permanent nature to real property is the diminution of the market value of the property); Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) (finding the measure of damages for permanent injury to real property, whether asserted under nuisance, trespass, negligence, or inverse condemnation, is the diminution in the market value of the property). We therefore find no error.

[3] The Fund cites no authority in support of this argument, which is, at best, conclusory.

For the foregoing reasons, the order on appeal is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clemson University,

Appellant,

v.

Michael Speth,

Respondent.

Appeal From Pickens County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3302
Submitted December 6, 2000 - Filed February 20, 2001

REVERSED

John R. Gentry, of Clemson, for appellant.

William N. Epps, Jr., of Epps & Stathakis, of Anderson, for respondent.

Amicus Curiae: Pete Cantrell, of Greenville, for Protection and Advocacy for People with Disabilities, Inc.

HUFF, J.: Clemson University appeals the order of the circuit court reversing Michael Speth's conviction in the Clemson University Municipal Court for unlawfully parking in a designated handicapped space and remanding the case for a new trial.[1] We reverse.

FACTS

On October 4, 1998, Speth and two friends returned to Clemson University after a weekend away. Speth parked in a designated handicapped space. He and his friends removed some rather heavy items from the trunk of the car. The unloading took "less than a minute." Speth then reentered his car. Officer Ikenegbu, who had been dispatched to the area in response to a complaint about the handicapped parking situation, blocked Speth from leaving. Officer Ikenegbu took a picture of the car and issued Speth a ticket for unlawful parking in a designated handicapped space, in violation of South Carolina Code Ann. § 56-3-1970 (1991 & Supp. 2000).[2] Speth admitted that he saw the sign designating the parking place as a handicapped space.

Speth was tried by a jury in Clemson University Municipal Court. He was found guilty and fined.

Speth appealed to circuit court, arguing among other grounds the trial court erred in failing to charge the jury the definition of "park" as set forth in South Carolina Code Ann. § 56-5-610 (1991). This definition provides: "To

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[1] Protection & Advocacy for People with Disabilities, Inc. filed an amicus curiae brief in support of reversing the decision of the circuit court.

[2] "It is unlawful to park any vehicle in a parking place clearly designated for handicapped persons unless the vehicle bears the distinguishing license plate or placard provided in Section 56-3-1960."

'park,' when prohibited, means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading." The circuit court found this definition of park was applicable to § 56-3-1970, which prohibits parking in a place clearly designated for handicapped persons unless the vehicle bears a license plate or placard authorizing the vehicle to park in such spaces. It granted Speth a new trial and directed the trial court on remand to charge the definition of "park" as set forth in § 56-5-610. Clemson University appealed.

DISCUSSION

Clemson University argues the circuit court erred when it reversed Speth's conviction for violating § 56-3-1970 based upon the trial court's failure to charge § 56-5-610 to the jury. We agree.

It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge. Sanders v. Western Auto Supply Co., 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971). However, the trial court does not err in refusing to give a requested jury instruction where it does not state the correct law. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). Thus, we must determine whether § 56-5-610's definition of "park" is applicable to § 56-3-1970, which makes it unlawful to park an unauthorized vehicle in a parking place clearly designated for handicapped persons.

The primary concern in interpreting a statute is to determine the intent of the legislature if it reasonably can be discovered in the language when construed in the light of its intended purpose. Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). The goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that

would lead to a result that is plainly absurd. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Ray Bell Constr. Co., 331 S.C. at 26, 501 S.E.2d at 729 (quoting Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Section 56-5-610 is part of the Uniform Act Regulating Traffic on Highways. The provisions of this Act "refer exclusively to the operation of vehicles upon the highways, except: (1) When a different place is specifically referred to in a given section; and (2) That the provisions of Articles 9 and 23 shall apply upon highways and elsewhere throughout the State." S.C. Code Ann. § 56-5-20 (1991). Article 3 sets forth the definitions as applicable to the Act. S.C. Code Ann. § 56-5-110 (1991) ("For the purposes of this chapter the words, phrases and terms defined in this article shall have the meanings thereby attributed to them."). (emphasis added).

The Uniform Act Regulating Traffic on Highways, while stating no person shall park in specified areas[3], allows for temporary parking for loading and unloading. We find no indication the Legislature intended the Act's definition of the word "park" as set forth in § 56-5-610 to apply to statutes

[3] See e.g., S.C. Code Ann. § § 56-5-2510 (Supp. 2000); S.C. Code Ann. § 56-5-2530 (1991 & Supp. 2000); S.C. Code Ann. § 56-5-2540 (Supp. 2000).

outside of the Act. Furthermore, we find the Legislature could not possibly have intended the Act's definition of "park" to apply to § 56-3-1970. In providing for designated handicapped parking places, the Legislature recognized the need of people with disabilities for special parking privileges.[4] These designated spaces are exclusively for the use of people with disabilities. If the Act's definition of "park" applied, able-bodied drivers would be allowed to use designated handicapped parking spaces "temporarily for the purpose of and while actually engaged in loading or unloading." Such an interpretation would defeat the plain legislative intention of providing parking places exclusively for the use of people with disabilities. Accordingly, we hold the definition of "park" as set forth in § 56-5-610 does not apply to § 56-3-1970. The trial court did not err in refusing Speth's request to charge the jury with this definition of the word "park." The order of the circuit court granting Speth a new trial is

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[4] The amicus curiae brief explained the importance of handicapped parking:

> These parking spaces make it possible for people with many types of disabilities to visit stores, offices, government buildings, and (as shown in this case) schools. People who use wheelchairs often cannot exit their cars in crowded parking lots without a clear aisle beside the parking space. The aisle makes it possible for wheelchair lifts to descend from specially equipped vans. For those individuals without lifts, the aisles allow them to safely transfer into their wheelchair and roll out from beside their vehicle. People with disabilities who do not use wheelchairs may be unable to reach public buildings unless they are able to park close to the entrance. Heart conditions, emphysema, and multiple sclerosis are a few of the conditions that may make walking more than a very short distance impossible. Because of this limitation on their mobility a parking space close to the entrance may be the only way they are able to enter a public building independently.

reversed and Speth's conviction in the Clemson University Municipal Court for violating § 56-3-1970 is reinstated.

REVERSED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Toomer, Laura M. Simpson, and Tammy Taylor, Personal Representatives of the Estate of Lamont Leon Livingston, Deceased,

Plaintiffs,

v.

Norfolk Southern Railway Company, South Carolina Department of Transportation, Orangeburg County, and Frankie Lee Tyler,

Defendants,

Of whom

Norfolk Southern Railway Company, is,

Appellant,
and

Frankie Lee Tyler is

Respondent.

Appeal From Orangeburg County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3303
Heard January 9, 2001 - Filed February 20, 2001

AFFIRMED

Robert L. Widener, Robert W. Dibble and Robert A. Muckenfuss, all of McNair Law Firm, of Columbia, for appellant.

William P. Davis and Kirby D. Shealy, III, both of Baker, Barwick, Ravenel & Bender, of Columbia, for respondent.

GOOLSBY, J.: Norfolk Southern Railway Company appeals the grant of summary judgment in favor of Frankie Lee Tyler on its cross-claim for equitable indemnity. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On May 18, 1995, Lamont Leon Livingston was riding as a passenger in a vehicle driven by Frankie Lee Tyler on South Carolina highway S-38-1029 in Orangeburg, South Carolina. As the vehicle attempted to cross a train track owned by the Norfolk Southern Railway Company ("Norfolk Southern"), a Norfolk Southern train struck the vehicle, resulting in fatal injuries to Livingston.

On May 14, 1997, in their capacities as personal representatives of the Estate of Livingston, plaintiffs Linda Toomer, Laura M. Simpson, and Tammy Taylor commenced a survival action and a suit for wrongful death against Norfolk Southern, the South Carolina Department of Transportation, Orangeburg County, and Tyler, alleging negligence and joint and several liability. In its answer Norfolk Southern asserted cross-claims for contractual and equitable indemnity against Tyler.

Tyler moved for summary judgment on the cross-claims in both actions. In response to the motion, Norfolk Southern acknowledged that no contract

existed between itself and Tyler and dropped its cross-claims for contractual indemnity. On the remaining claim for equitable indemnity, the trial court granted summary judgment, finding: (1) "the requirement of a special relationship remains the law in South Carolina"; and (2) since "[t]here was no contractual, master/servant, contractor/subcontractor or other relationship between Defendant Tyler and Norfolk Southern at the time of the collision . . . no cause of action for equitable indemnity lies between Tyler and Norfolk Southern." Norfolk Southern appeals.

LAW/ANALYSIS

Norfolk Southern argues a special relationship between the parties is not a prerequisite for recovery under a claim for equitable indemnity and, therefore, summary judgment was improper. We disagree.

I.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] It is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law.[2]

> A party opposing a summary judgment motion on an indemnification claim, even though the motion is based primarily upon the complaint, has the two-fold burden of demonstrating a genuine issue of material fact regarding the opposing party's lack of liability and a genuine issue of material fact regarding the

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[1] Mosteller v. County of Lexington, 336 S.C. 360, 520 S.E.2d 620 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP.

[2] Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).

> moving party's liability. The failure to meet this two-fold burden is fatal to the indemnification claim.[3]

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.[4]

II.

South Carolina has long recognized the principle of equitable indemnification.[5]

> Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party.[6]

Courts have traditionally allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second

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[3] Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64-65, 518 S.E.2d 301, 307 (Ct. App. 1999) (citations omitted).

[4] Young, 333 S.C. at 718, 511 S.E.2d at 415.

[5] See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992) (hereinafter Winnsboro II) aff'g 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990); Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 301 S.E.2d 552 (1983); Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971); Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.

[6] Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) (citations omitted) (hereinafter Winnsboro I), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992).

parties.[7] According to the principles of equity, the right exists "whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join."[8]

In Winnsboro I,[9] this court was asked to determine the indemnification issues between a contractor and subcontractor named as codefendants in a suit alleging breach of contract, negligence, and fraud. The general contractor, Turner-Murphy Company, was hired to construct a waste water treatment facility for the Town of Winnsboro. Turner-Murphy, in turn, hired the subcontractor, Specialty Constructors, Inc., to manufacture and install the filter system to be used in the facility. When the facility failed to operate properly, Winnsboro brought suit against both Turner-Murphy and Specialty. The jury awarded Winnsboro actual and punitive damages against Specialty but exonerated Turner-Murphy on all claims. Thereafter, the trial judge directed a verdict in favor of Turner-Murphy on its cross-claim for indemnity against Specialty. Specialty appealed and we affirmed.

In Winnsboro II, our supreme court granted certiorari to review this court's decision in Winnsboro I. In so doing, the supreme court addressed the requirement of a special relationship between indemnitee and indemnitor.

The court began by comparing the facts of Winnsboro with its earlier case of Addy v. Bolton.[10] In Addy, the court found an innocent landlord may recover under a theory of indemnity when it is forced to reimburse its tenant for a loss caused by a negligent third party. Bolton, the landlord, hired C.Y. Thomason

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[7] First Gen. Servs. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994); Vermeer, 336 S.C. at 60, 518 S.E.2d at 305; Winnsboro I, 303 S.C. at 57, 398 S.E.2d at 503.

[8] Stuck, 279 S.C. at 24, 301 S.E.2d at 553.

[9] 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990).

[10] 257 S.C. 28, 183 S.E.2d 708 (1971).

Company, a general contractor, to make repairs to a store it leased to Addy. Thomason's welding work started a fire which damaged the stock and merchandise in Addy's retail jewelry store. Addy commenced suit against both Bolton and Thomason. The Winnsboro II court explained:

> The relationship between Bolton, the owner, and [Thomason], the contractor, was sufficient in [Addy] to allow Bolton to recover his attorney fees and costs for defending the negligence of [Thomason]. [Thomason] negligently burned Bolton's building. Because of [Thomason's] negligence toward Bolton, Bolton was forced to defend in an action brought by Addy. We think the relationship here [in Winnsboro II] between Turner-Murphy, the contractor, and Specialty Constructors, the subcontractor, sufficiently analogous to the relationship in Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971), to allow Turner-Murphy to recover attorney fees and costs expended in defending the negligence of Specialty Constructors.[11]

The court went on to state that "a sufficient relationship exists when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct."[12]

In light of our supreme court's decision in Winnsboro II, we concur with the finding of the trial judge. In order to sustain a claim for equitable indemnity, the existence of some special relationship between the parties must be established.[13]

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[11] Winnsboro II, 307 S.C. at 131, 414 S.E.2d at 120 (emphasis added).

[12] Id. at 132, 414 S.E.2d at 121 (emphasis added).

[13] See, e.g., First Gen. Servs. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) ("We hold that the relationship of contractor/subcontractor is a sufficient basis to support a claim of equitable indemnification."); Stuck, 279 S.C. at 22, 301 S.E.2d at 552 (holding purchaser of defective vehicle was

CONCLUSION

In reviewing a ruling by the trial court on equitable indemnity, this Court must look beyond the complaint.[14] The Record on Appeal, however, is devoid of any relationship between Norfolk Southern and Tyler other than their relationship as co-defendants. The lack of any special relationship between the parties is, therefore, fatal to Norfolk Southern's claim for equitable indemnity from Tyler.

AFFIRMED.

CURETON and CONNOR, JJ., concur.

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entitled to indemnification from seller where purchaser was sued by a third party for an accident caused by the defective condition); Addy, 257 S.C. at 28, 183 S.E.2d at 708 (holding landlord entitled to indemnification from general contractor for damage contractor caused to tenant's property); Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990) (holding house vendor entitled to indemnification from exterminator for settlement reached with purchaser where vendor had no knowledge that exterminator's wood infestation report issued to seller was false); Cf. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 67, 518 S.E.2d 301, 309 (Ct. App. 1999) ("Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right to indemnity between them.").

[14] Winnsboro II, 307 at 132, 414 S.E.2d at 121.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

James A. Brown, Sr.,

Appellant.

Appeal From Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 3304
Heard December 13, 2000 - Filed February 20, 2001

AFFIRMED AS MODIFIED

James A. Brown, Jr., of Beaufort, for appellant.

Senior Assistant General Counsel William L. Todd, of South Carolina Department of Public Safety, of Columbia, for respondent.

CONNOR, J.: A magistrate's court jury found James A. Brown, Sr., guilty of speeding. Brown appealed his conviction to the Court of Common

Pleas. The circuit court judge dismissed the appeal because Brown did not serve a timely notice of appeal on the South Carolina Department of Public Safety [SCDPS]. Brown appeals the dismissal. We affirm the decision of the circuit court as modified.

FACTS

On May 27, 1997, James A. Brown, Sr., was traveling east on Highway 76. Brown was clocked going 62 mph in a 40 mph zone by a moving radar mounted in a Highway Patrol cruiser. Lance Corporal Sherry McLeod issued Brown a summons for speeding (62 mph in a 40 mph zone).

On June 26, 1998, Brown was tried for the traffic violation by a jury in the Magistrate Court of Sumter. During the course of the trial, Brown objected to the admission of a radar speed measurement reading offered by the arresting officer. Brown asserted the State had to establish through appropriate foundational evidence that moving radar speed measurement devices were reliable and generally accepted among the scientific community. The magistrate overruled Brown's objection and admitted the radar evidence.

Later in the course of the trial, Brown attempted to introduce a videotape of the incident location. The magistrate concluded that the tape was not admissible because it had not been made on the same day, or even the same time of day the ticket was issued. The magistrate further found that the video was cumulative to the testimony and graphic evidence presented. Brown was, however, allowed to proffer the video.

At the close of the evidence, the jury found Brown guilty of the speeding violation. As a result, Brown was fined $95 by the magistrate on June 29, 1998.

Brown served a Notice of Appeal on the magistrate on July 6, 1998, by depositing it in the U.S. mail. On the bottom of his Notice of Appeal, Brown listed Pat Teague as the attorney of record for the SCDPS. However, Brown did not serve the SCDPS with a notice of appeal.

On October 3, 1998, Brown sent a letter to Pat Teague, the attorney for SCDPS, "to inform [him] of the upcoming appeal." On October 12, 1998, the SCDPS filed a motion to dismiss Brown's appeal for failure to timely serve notice of the appeal.

On October 26, 1998, the circuit court judge took the notice issue under advisement and heard the merits of the appeal. In his order dated November 14, 1998, the circuit court judge granted the motion to dismiss the appeal, but addressed the issues raised by Brown and found them to be without merit. On July 15, 1999, the circuit court judge issued an amended order denying Brown's motion to reconsider and citing additional authority for his original order.

LAW/ANALYSIS

I.

Before addressing the merits of Brown's other issues on appeal, we must decide whether the circuit court had subject matter jurisdiction to hear Brown's appeal. "Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985).

Sections 18-3-10 through -70 provide for appeals from magistrates in criminal cases. S.C. Code Ann. §§ 18-3-10 through -70 (1985 & Supp. 2000). Section 18-3-10 provides, "Every person convicted before a magistrate of any offense whatever and sentenced may appeal from the sentence to the Court of Common Pleas for the county."[1] S.C. Code Ann. § 18-3-10 (Supp. 2000). Upon conviction and sentence, the appellant has ten days to "serve notice of appeal

[1] Section 18-3-10 was amended in 1994 to require criminal convictions in a magistrate's court to be appealed to the Court of Common Pleas instead of the "next term of the court of general sessions for the county." Act No. 520, 1994 S.C. Acts 5930.

upon the magistrate who tried the case." S.C. Code Ann. § 18-3-30 (1985). Within ten days of being served with the appellant's notice, the magistrate is required to file the notice with the clerk of court. S.C. Code Ann. § 18-3-40 (Supp. 2000). However, there is no mention of service of the notice of appeal on the State (the SCDPS in this case).

The dilemma posed in this case has arisen because criminal appeals from magistrates are heard in courts that operate under the Rules of Civil Procedure. Because appeals from criminal convictions are heard in the Court of Common Pleas, the SCDPS argues that Rule 74, SCRCP, mandates the appellant serve notice of appeal on the SCDPS. Rule 74 provides:

> Except for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court . . . shall be in accordance with the statutes providing such appeals. Notice of appeal to the circuit court must be served on all parties within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from. In all such appeals the notice of intention to appeal shall be filed with the clerk of the court to which the appeal is taken and with the inferior court . . . within the time provided by the statute, or by this rule when no time is fixed by statute, for service of the notice of intention to appeal.

Rule 74, SCRCP. As delineated above, the procedure on appeal to the circuit court from the magistrate is provided in sections 18-3-10 through -70. However, that procedure only specifically requires the appellant to serve the magistrate with the notice of appeal. It does not address whether the appellant must serve the State.

There are no cases explaining the interaction between Rule 74 and appeals from criminal convictions in magistrates courts. Likewise, there are only a few cases explaining the purpose of Rule 74. Those cases basically quote from the Reporter's Note following Rule 75 that explains both Rules 74 and 75.

See Eagles v. South Carolina Nat'l Bank, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990); Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia, Inc., 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988). The Reporter's Note explains:

> These Rules 74 and 75 are added to make uniform the procedure on appeals to the Circuit Court where there is no provision by statute. They do not replace any provisions as to such appeals in Title 18 of the Code, . . . but are added to supply omissions in these statutes where no provision is made for the time to file notice of intention to appeal, the form of the record on appeal, or how it shall be transmitted.

Rule 75, SCRCP (Reporter's Note). This comment seems to support the SCDPS argument that Rule 74 fills in the procedural gaps not addressed in sections 18-3-10 through -70.

In Witzig v. Witzig, 325 S.C. 363, 479 S.E.2d 297 (Ct. App. 1996), this Court discussed Rule 74 briefly. We said, "While [Rule 74] requires service on all parties of notice of appeal 'within thirty (30) days after receipt of written notice of the judgment, order, or decision appealed from,' Rule 74 applies only 'when no time is fixed by statute.'" Id. at 366, 479 S.E.2d at 299 (quoting Rule 74, SCRCP). Chapter 3 of Title 18 does not provide a time fixed by statute to serve notice of appeal on the State, so the position of the SCDPS is that the 30 day period provided in Rule 74 applies. On the other hand, Brown's position is that no time is provided in the statutes because he is not required to serve notice of appeal on the State. Brown maintains that if anyone is required to serve notice of appeal on the State, it is the magistrate.

In summation, the SCDPS contends Rule 74 applies to all appeals taken to the Court of Common Pleas from inferior courts, including appeals from criminal convictions in magistrate courts. Conversely, Brown argues the controlling statutes do not require him to serve notice of appeal on anyone other than the magistrate, and Rule 74 only applies to civil actions.

The scope of the South Carolina Rules of Civil Procedure is limited to "all suits of a civil nature whether cognizable as cases at law or in equity." Rule 1, SCRCP. "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (citations omitted). Because the scope of the Rules of Civil Procedure is limited by Rule 1, Rule 74 only applies to civil actions. The action *sub judice* is clearly criminal in nature. Therefore, Rule 74 does not apply to Brown's appeal and the circuit court erred in dismissing the action based on lack of subject matter jurisdiction.[2]

Even though the circuit court dismissed Brown's appeal when it incorrectly determined that it lacked subject matter jurisdiction, it alternatively found Brown's issues on appeal meritless. Because we find the circuit court had subject matter jurisdiction to hear the appeal, we address Brown's remaining issues below.

II.

Brown argues the circuit court erred in affirming the magistrate's admission of the reading from the moving radar speed measurement device without first requiring evidence of a scientific foundation.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. International Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996).

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[2] Our decision does not address how the SCDPS should have been notified of Brown's appeal. Undoubtedly, notice must be provided. However, the rules and statutes are silent and fail to impose this responsibility on either the magistrate, the clerk of court, or the appellant.

Although the magistrate refused to require SCDPS to lay any specific foundation before allowing the radar reading into evidence, SCDPS attempted to satisfy Brown's request through Officer McLeod's testimony. Officer McLeod testified she was trained in the operation of moving radar at the South Carolina Criminal Justice Academy. She was initially trained and certified in 1991 and was subsequently recertified every three years. Before citing Brown for speeding in May 1997, Officer McLeod's most recent recertification was in April 1996.

Officer McLeod explained to the jury the procedure she was taught at the Criminal Justice Academy for verifying that the radar was in proper working condition before and after each shift. She also testified that she followed that procedure on the day she ticketed Brown and that the radar was functioning properly.

Brown's main contention at trial and on appeal was that the radar reading could have been subject to interference at the location where the radar was used. However, Brown was free to call into question the reliability of the evidence through cross-examination or by calling his own expert in the reliability of readings from moving radar.

We agree with the circuit court that the magistrate did not abuse her discretion by allowing the reading from the moving radar into evidence.

III.

Brown also argues the circuit court erred in sustaining the magistrate's exclusion of a videotape of the incident location proffered by Brown.

Brown attempted to introduce a videotape he prepared of the general site where the officer ticketed him. The magistrate refused to admit the videotape. The video was not made on the same day as Brown was cited for speeding. The video also depicts the site at a different time of day than when

Brown was cited. Furthermore, the roadway had undergone some changes since the time of the incident.

Once again, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble, 323 S.C. at 373, 474 S.E.2d at 441. Nevertheless, even if the magistrate should have allowed the video into evidence, it was cumulative to the prior testimony regarding the roadway and the diagram of the road used at trial. The exclusion of the video was harmless because the video was cumulative to other evidence and no prejudice resulted from its exclusion. State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 793-94 (Ct. App. 1999). Therefore, we find no error in the magistrate's exclusion of the videotape prepared by Brown.

For the foregoing reasons, the order of the circuit court is

AFFIRMED AS MODIFIED.

CURETON and GOOLSBY, JJ., concur.